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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 349

EUGENE E. HANF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B, 18–31) has not yet been reported. The opinion of the district court (Pet. App. A, 11–17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 25, 1956 (Pet. App. C, 32). The petition for a writ of certiorari was filed August 24, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the first count of an indictment, which charged that for an eight-month period petitioner

unlawfully failed to keep records and filed incorrect reports, specified in the indictment as records of wholesale liquor dealers, was fatally defective, so as to be subject to a motion to dismiss at trial, in that it failed to allege that during the period mentioned petitioner was a wholesale liquor dealer.

2. Whether the count was fatally defective for duplicity in charging as one offense actions with respect to monthly reports covering an eight-month period.

3. Whether 27 U. S. C. 203 (c), which requires a permit from the Secretary of the Treasury for those engaged in the business of purchasing liquor for resale at wholesale, is unconstitutional as applied to a wholesaler whose purchases and sales were made intrastate.

STATUTES, REGULATIONS AND RULES INVOLVED

26 U. S. C. 2857 provided in pertinent part:

> Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: * * * The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.
>
> * * * * *
>
> Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in

the form prescribed * * * or makes any false entry therein * * * shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

26 C. F. R. 194.210 provided in part:

> Except as provided in § 194.214 [not here applicable], every wholesale dealer in liquors who sells distilled spirits shall keep Record 52, and render monthly transcripts, Forms 52A and 52B, and Form 338, of the physical receipt and disposition of distilled spirits by him. Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the columns and lines of the form and the instructions printed thereon or issued in respect thereto, as required by the provisions of this part, before the close of the business day next succeeding the day on which the transactions occur. * * *

26 C. F. R. 194.229 provided in part:

> If there were no receipts and disposals of distilled spirits by a wholesale liquor dealer during a month, it will not be necessary to prepare Forms 52A and 52B. However, a summary on Form 338 must be prepared and forwarded to the Assistant Regional Commissioner, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked "No transactions during month." * * *

Section 3 of the Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 978, as amended, 27 U. S. C. 203, provides in pertinent part:

In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

* * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages.

Rule 7 (c),, F. R. Crim. P., provides in part:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Rule 12 (b)) (2), F. R. Crim. P., provides:

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

STATEMENT

Petitioner was convicted in the United States District Court for Minnesota on two counts charging, in count I, a violation of 26 U. S. C. 2857 by reason of the failure to file monthly reports and the filing of false reports required of wholesale liquor dealers, and, in count III, a violation of 27 U. S. C. 203 (c) by reason of his having engaged in the business of purchasing liquor for resale at wholesale without having obtained the basic permit required by that statute. He was sentenced to pay a fine of $1,500, and to prison for three months on the first count, and to a fine of $1,000, on the third. On appeal, the judgment was affirmed (Pet. 32).

Petitioner does not challenge the sufficiency of the evidence to show the violations charged. The government's evidence showed that, although petitioner made substantial sales of more than five gallons to one person, including sales for resale (R. 14–18), his monthly summaries filed with the Internal Revenue Service, for the most part, recorded "No transactions", and that, consonant with those statements, he filed no daily reports of sales on form 52B (R. 3–15; see Regulations *supra,* p. 3). He did not have the permit required for persons selling at wholesale for resale (R. 9). Petitioner attacks the validity of the indictment as to count I, and the constitutionality of the statute involved in count III.

Count I charged that between October 16, 1953, and July 1, 1954, petitioner "did then and there wilfully, wrongfully, unlawfully and intentionally fail to make entries in and properly keep Record

52B, 'Wholesale Liquor Dealer's Monthly Report', and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)', and knowingly and intentionally and wilfully submitted and filed said forms and documents, containing false statements and false entries, with the United States Treasury Department, Internal Revenue Service" (see Pet. 19).

Although the indictment was returned on September 9, 1954, and petitioner, who was represented by counsel, entered a not guilty plea on September 27, 1954, he made no motion attacking the validity of the indictment until the opening of trial on May 23, 1955. At that time he made an unsuccessful motion to dismiss count I for duplicity and failure to state an offense, confining his argument, however, to the contention that since the count covered monthly reports for an eight-month period, it charged eight offenses rather than one (R. 3, see Pet. 11, 13). As to count III the contention was that the statute was unconstitutional as applied to one who purchased and sold intrastate (R. 3, see Pet. 11). The motions were renewed at the close of trial and again denied (R. 20–21, see Pet. 12). The court, however, agreed to give counsel further opportunity to be heard. In briefing the validity of count I, petitioner attacked it, not only for duplicity, but for failure to allege that he was a person required to make the described reports (see Pet. 12–13).

The district court ruled that the objections to count I were untimely (Pet. 13) but that, in any event, the indictment was sufficient to acquaint the petitioner

with the charge (Pet. 13), and covered in that count only one offense (Pet. 14–15). It also held that 27 U. S. C. 203 was constitutional as applied to petitioner, stating that in "view of the broad powers of the Government with respect to the enforcement of its revenue laws, the Act irrespective of interstate commerce is reasonably related to the protection of government revenue" (Pet. 16–17).

The Court of Appeals agreed that petitioner's objections to count I were both untimely and without merit (Pet. 24–25). It upheld the constitutionality of the Federal permit requirement as applied to petitioner under both the commerce and the taxing power (Pet. 29–31).

ARGUMENT

1. The courts below were clearly correct in holding that the first count of the indictment sufficiently informed petitioner that he was being charged as a wholesale liquor dealer with filing incorrect reports, to state an offense under 26 U. S. C. 2857 (*supra*, p. 2.) The allegation that petitioner unlawfully failed to make entries and properly to keep the Wholesale Liquor Dealers Monthly Reports necessarily carried the implication that petitioner was charged with failing to keep the records he was required to keep as a wholesaler. And the further allegation that petitioner had actually filed false reports certainly informed him that he was being charged with falsifying records which he himself had recognized that he, as a wholesale liquor dealer, was required to file. Petitioner was a wholesaler under the statute not only if he sold, but if he offered to sell liquor in more

than five gallon quantities (26 U. S. C. 2857, *supra*, p. 2). Under the regulations (*supra*, p. 3), petitioner was required (as he did) to file Form 338 even if he had no wholesale liquor transactions in a particular month. Under these circumstances, the indictment could not have been subject to misinterpretation. It met the basic test of apprising petitioner of the charge he must be prepared to meet and of protecting him from a second prosecution for the same offense. *United States* v. *Debrow*, 346 U. S. 374,376; *Hagner* v. *United States*, 285 U. S. 427, 431.

2. Petitioner's argument that the first count was duplicitous in that each monthly report should have been the subject of a separate count was belated (see Rule 12, F. R. Crim. P., *supra*, p. 4) and is without merit. Petitioner is hardly in a position to complain because the Government held him subject to one punishment rather than eight. His eight monthly reports were part of one general scheme for concealing his sales at wholesale, and could properly be charged as one offense, whether or not they could technically have been split into separate offenses. *Yip Wah* v. *United States*, 8 F. 2d 478 (C. A. 9), certiorari denied, 270 U. S. 645; cf. *United States* v. *Universal C. I. T. Corp.*, 344 U. S. 218.

3. The attack on the constitutionality of the basic permit requirement of 27 U. S. C. 203 (c) as applied to a wholesaler who purchases and sells intrastate is without foundation. There are a number of sources of Federal power spelled out in the statute itself—*i. e.*, the Twenty-First Amendment, interstate commerce and the taxing and postal power—and all of

them support the permit requirement. A record of those who engage in the business of selling for resale would manifestly aid, and not detract from, the power conferred on the states by the Twenty-First Amendment to adopt their own methods of controlling the liquor traffic. Cf. *United States* v. *Frankfort Distilleries,* 324 U. S. 293. Since purchases by wholesalers largely result from interstate shipments, whether or not the immediate purchase is made interstate, and since sales by wholesalers to trade purchasers could often again set in motion a stream of interstate commerce, the permit requirement has a manifest relationship to Congressional power to control interstate commerce in liquor. And finally, registration requirements, such as the permit requirement in effect is, are a recognized means of aid in collecting revenue. *United States* v. *Kahriger,* 345 U. S. 22, 31–32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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